Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-87–09 OF 2016 AND WA-24C-91–09 OF 2016
LEE SWEE SENG J
31 JANUARY 2017

Building and Construction Law — Construction contracts — Adjudication — Respondent failed to pay to claimant payment for work done — Claimant proceeded with adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the Act') — Adjudicator found in favor of claimant — Respondent applied to set aside adjudicator's decision under s 15 of the Act — Claimant applied to enforce adjudicator's decision under s 28(1) of the Act — Whether adjudicator ventured outside payment claim and thus acted in excess of jurisdiction — Whether there was breach of natural justice — Whether adjudicator acted in excess of jurisdiction in granting interest — Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 15, 25(o), 27(1) & 28(1)

Milsonland Development Sdn Bhd ('the respondent') had appointed Macro Resources Sdn Bhd ('the claimant') as the main contractor to carry out the contract for earthwork and RC retaining walls, building and infrastructure works ('the works') on lands located in Petaling, Selangor. Problem arose when the respondent failed to pay the payments certified vide interim certificate Nos 29 and 30 to the claimant. Consequently, the claimant proceeded with adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the Act'). The claimant had served the payment claim to the respondent but there was no payment response by the respondent. The claimant then proceeded with the filing of the adjudication notice and followed up with the service of the adjudication claim on the respondent. In response, the respondent had served adjudication response on the claimant. The adjudicator found in favor of the claimant. Dissatisfied with the decision of the adjudicator, the respondent filed an action to set aside the said decision pursuant to s 15 of the Act ('the respondent's action'). On the other hand, the claimant had also filed an action to enforce the said adjudication decision as if it was a judgment of the High Court under s 28(1) of the Act ('the claimant's action'). The issues for court's consideration were: (a) whether the adjudicator had ventured outside the payment claim and thus acted in excess of his jurisdiction; (b) whether there was a breach of natural justice when the adjudicator disregarded the issue of delay and defects raised for the first time by the respondent in its adjudication response; and (c) whether the adjudicator had acted in excess of jurisdiction in granting interest on the amount outstanding.

Held, dismissing the respondent's action and allowing the claimant's action with costs of RM10,000:

(1) The jurisdiction of the adjudicator to hear the dispute before him was confined only to matters raised in the payment claim and the payment response as provided under ss 5, 6 and 27(1) of the Act. The adjudicator had correctly appraised himself of what the claimant needed to prove with respect to value of work done as certified by the two payment claims in certificate Nos 29 and 30 and the amount paid to date by the respondent. The court agreed with the approach taken by the adjudicator that the failure of the respondent to file its payment response was that the claimant was merely put to proof of its claim and the respondent could not assert positive defences, for example by way of set off or counterclaim. The adjudicator had acted within the scope and ambit of the matters referred to him in the payment claim in the absence of a payment response (see paras 15, 17 & 44).

(2) The respondent had not raised the issue of alleged delay and defects on the part of the claimant in the payment response and as such the respondent had no right to raise the said issue at the adjudication response stage. There was no breach of natural justice when as constrained by the clear provision of s 27(1) of the Act, the adjudicator did not consider the issues of delay and defective works raised for the first time in the respondent's adjudication response (see paras 46 & 53).

(3) A claim for interest was made in the adjudication claim and the respondent had opportunity to respond to it. This claim for interest may be regarded as consequentially and naturally flowing from the amount claimed in the payment claim. The adjudicator had acted well within his powers pursuant to s 25(o) of the Act wherein the adjudicator shall have the power to award financing costs and interest (see paras 55–57).

[Bahasa Malaysia summary

Milsonland Development Sdn Bhd ('responden') telah melantik Macro Resources Sdn Bhd ('penuntut') sebagai kontraktor utama untuk menjalankan kontrak bagi kerja tanah dan tembok penahan RC, kerja bangunan dan infrastruktur ('kerja') atas tanah yang terletak di Petaling, Selangor. Masalah timbul apabila responden gagal membayar bayaran yang diperakukan melalui perakuan sementara No 29 dan 30 kepada penuntut. Berikutan itu, penuntut meneruskan dengan adjudikasi di bawah Akta Bayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Penuntut telah menyerahkan tuntutan bayaran itu kepada responden tetapi tiada respon pembayaran oleh responden. Penuntut kemudian meneruskan dengan memfailkan notis adjudikasi dan disusuli dengan serahan tuntutan adjudikasi ke atas responden. Sebagai respon, responden telah menyerahkan respon adjudikasi ke atas penuntut. Adjudikator telah membuat keputusan yang menyebelahi penuntut. Berasa tidak puas hati

dengan keputusan adjudikator itu, responden telah memfailkan tindakan untuk mengetepikan keputusan tersebut menurut s 15 Akta tersebut ('tindakan responden'). Sebaliknya, penuntut juga telah memfailkan tindakan untuk menguatkuasakan keputusan adjudikasi tersebut seolah-olah ia adalah penghakiman Mahkamah Tinggi di bawah s 28(1) Akta tersebut ('tindakan penuntut'). Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada adjudikator telah meneroka di luar tuntutan pembayaran dan dengan itu bertindak melampaui bidang kuasa; (b) sama ada terdapat pelanggaran keadilan asasi apabila adjudikator mengabaikan isu kelewatan dan kecacatan yang timbul untuk kali pertama oleh responden dalam respon adjudikasi itu; dan (c) sama ada adjudikator telah bertindak melampaui bidang kuasa dengan memberikan faedah atas baki jumlah.

Diputuskan, menolak tindakan responden dan menolak tindakan penuntut dengan kos RM10,000:

(1) Bidang kuasa adjudikator untuk mendengar pertikaian di hadapan beliau terhad hanya kepada perkara-perkara yang ditimbulkan dalam tuntutan bayaran dan respon bayaran sepertimana diperuntukkan di bawah ss 5, 6 dan 27(1) Akta tersebut. Adjudikator telah mentaksir sendiri sewajarnya tentang apa yang perlu dibuktikan oleh penuntut berkaitan nilai kerja yang dilakukan sepertimana yang diperakui oleh dua tuntutan bayaran dalam perakuan No 29 dan 30 dan jumlah terkini yang telah dibayar oleh responden. Mahkamah bersetuju dengan pendekatan yang diambil oleh adjudikator bahawa kegagalan responden untuk memfailkan respon bayarannya adalah di mana penuntut hanya mengemukakan bukti tuntutannya dan responden tidak boleh menegaskan pembelaan yang positif, sebagai contoh melalui penepian atau tuntutan balas. Adjudikator telah bertindak dalam skop dan ruang lingkup perkara-perkara yang dirujuk kepadanya dalam tuntutan bayaran di mana tiada respon bayaran (lihat perenggan 15, 17 & 44).

(2) Responden tidak menimbulkan isu kelewatan dan kecacatan yang dikatakan di pihak penuntut dalam respon bayaran dan oleh itu responden tiada hak untuk menimbulkan isu tersebut diperingkat respon adjudikasi. Tiada pelanggaran keadilan asasi kerana apabila dikekang oleh peruntukan jelas s 27(1) Akta, adjudikator tidak menganggap isu-isu kelewatan dan kerja-kerja defektif dinaikkan buat kali pertama dalam respon adjudikasi responden (lihat perenggan 46 & 53).

(3) Tuntutan untuk faedah yang dibuat dalam tuntutan adjudikasi dan responden mempunyai peluang untuk bertindak balas terhadapnya. Tuntutan untuk faedah ini boleh dianggap sebagai akibat dan timbul secara semula jadi daripada jumlah yang dituntut dalam tuntutan bayaran itu adjudikator telah bertindak dalam bidang kuasanya menurut s 25(o) Akta tersebut di mana adjudikator hendaklah mempunyai kuasa

untuk mengawardkan kos pembiayaan dan faedah (lihat perenggan 55–57).]

Notes

For a case on construction contracts in general, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 4052.

Cases referred to

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941, HC (refd)

L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd [2007] 4 MLJ 518, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695, HC (folld)

WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd [2015] MLJU 1125; [2015] 1 LNS 1236, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 6(4), 9, 10, 10(1), 11, 15, 15(b), (d), 25, 25(a), (i), (j), (o), 27, 27(1), 28(1)

Ben Lee Kam Foo (Shafihani Md Ali with him) (Iza Ng Yeoh & Kit) in Originating Summons No WA-24C-87–09 of 2016 for the plaintiff.

Barry Goh (Chow Yee Wan with him) (Gan & Zul) in Originating Summons No WA-24C-91–09 of 2016 for the plaintiff.

Barry Goh (Chow Yee Wan with him) (Gan & Zul) in Originating Summons No WA-24C-87–09 of 2016 for the defendant.

Ben Lee Kam Foo (Shafihani Md Ali with him) (Iza Ng Yeoh & Kit) in Originating Summons No WA-24C-91–09 of 2016 for the defendant.

Lee Swee Seng J:

[1] Milsonland Development Sdn Bhd ('Milsonland'), as employer, had appointed Macro Resources Sdn Bhd ('Macro Resources') as the main contractor vide a letter of award, to carry out the contract for earthwork and RC retaining walls, building and infrastructure works ('the works') on Lot 3527 and 3528, Jalan Bukit Serdang 3/1, Seri Kembangan, Mukim Petaling, District of Petaling, Selangor.

[2] It was part of a project known as 'Cadangan Pembangunan Perumahan dan Perdagangan yang mengandungi Kedai Pejabat (3–5 Tingkat), Rumah Bandar (5 Tingkat) dan tempat letak kenderaan di atas Lot No 3527 dan Lot No 3528, Jalan Bukit Serdang 3/1, Seri Kembangan, Mukim Petaling, Daerah Petaling, Selangor Darul Ehsan'.

[3] The contract sum was stated to be RM42,561,017.22.

PROBLEM

[4] Disputes arose between the parties, with Macro Resources alleging that Milsonland had failed to pay the payments certified in its favour. Macro Resources proceeded with adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[5] Macro Resources, as the unpaid party, served a payment claim dated 11 December 2015 on Milsonland claiming as follows:

(a) work done as certified vide interim certificate No 29 dated 21 April 2014 by zone architect due for payment on 21 May 2014 pursuant to cl 9 of letter of award dated 24 February 2011; and

(b) work done as certified vide interim certificate No 30 dated 31 March 2015 by zone architect due for payment on 29 April 2015 pursuant to cl 9 of letter of award dated 24 February 2011.

[6] The calculation of the payment claim is as follows:

Certificate No 29	=	RM39,793,758.73
(Add) certificate No 30	=	RM 1,064,025.43
(Less) retention money (as per cl 9 letter of award)	=	RM 2,128,050.86
(Less) Total amount previously paid	=	RM 3,229,733.30

[7] There was no payment response served.

[8] Thereafter, Macro Resources as claimant, proceeded with the filing of the adjudication notice on 19 January 2016 and followed up with the service of the adjudication claim on Milsonland as respondent.

[9] The respondent in the adjudication served its adjudication response dated 19 May 2016 raising the following points:

(a) that the claimant had failed to complete the works by the completion date of 30 June 2012 (para 6 adjudication response);

(b) that the works carried out by the claimant had defects (para 10 adjudication response); and

(c) that the claimant's claim is not in accordance with certificates of payment Nos 29–30, and that the claimant has erroneously based its claim on the provisional contract sum of RM42,561,017.22 (paras 13–14 adjudication response).

[10] The adjudicator made his decision on 4 August 2016 that the respondent do pay the claimant as follows:

(a) RM3,229,733.30;

(b) interest on RM3,229,733.30 at 5%pa from 30 April 2015, amounting to RM205,023.64 at the date of the decision and continuing at RM442.00 daily until the date of satisfaction;

(c) RM108,285.30 being interest on RM2,165,707.87 at 5%pa from 30 April 2014–30 April 2015;

(d) RM50,000 in respect of party and party costs; and

(e) RM23,745.15 being reimbursement of sums and paid to KLRCA by the claimant.

PRAYERS

[11] Aggrieved with the adjudication decision, the respondent in the adjudication filed in the Originating Summons No WA-24C-87–09 of 2016 to set aside the decision pursuant to s 15 of the CIPAA, particularly s 15(b) and (d) of the CIPAA whereby the respondent relied on the ground that the adjudicator has acted in breach of natural justice and more particularly that he had acted in excess of his jurisdiction. Section 15 of the CIPAA reads as follows:

> 15 Improperly Procured Adjudication Decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) The adjudication decision was improperly procured through fraud or bribery;
>
> (b) There has been a *denial of natural justice;*
>
> (c) The adjudicator has not acted independently or impartially; or
>
> (d) The adjudicator has *acted in excess of his jurisdiction.*
>
> (Emphasis added.)

[12] Meanwhile the claimant had also filed an Originating Summons No WA-24C-91–09 of 2016 to enforce the said adjudication decision as if it is a judgment of the High Court under s 28(1) of the CIPAA which reads:

> 28 Enforcement of adjudication decision as judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

[13] By consent of the parties and for good reason, both the originating summonses were heard together for if the application for setting aside the adjudication decision is dismissed then generally the court would correspondingly grant an order to enforce the adjudication decision.

[14] The parties shall be referred to as claimant and respondent as they appeared in the adjudication or as Macro Resources and Milsonland respectively, to avoid the confusion of referring to them sometimes as the plaintiff and sometimes as the defendant.

PRINCIPLES

Whether the adjudicator had ventured outside the payment claim and thus acted in excess of his jurisdiction

[15] The adjudicator had correctly appraised himself of what the claimant needed to prove with respect to value of work done as certified by the two payment claims in certificate Nos 29–30 and the amount paid to date by the respondent. Based on the decision in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695, I agree with the approach taken by the adjudicator in that the failure of the respondent to file its payment response is that the claimant is merely put to proof of its claim and the respondent cannot assert positive defences, for example by way of set-off or counterclaim. This stems from the deeming provision in s 6(4) of the CIPAA in that by a failure of the non-paying party in the respondent to serve its payment response, the non-paying party is deemed to have disputed the entire of the payment claim.

[16] The adjudicator was thus right to have disregarded the matters raised in the adjudication response except in so far as they go to disproving the assertions made in the payment claim and the adjudication claim as served by the claimant.

[17] The jurisdiction of the adjudicator to hear the dispute before him is confined only to matters raised in the payment claim (s 5) and the payment response (s 6) as provided for in s 27(1) of the CIPAA. In other words his jurisdiction to hear the dispute is both conferred and circumscribed by ss 5, 6, and 27(1) of the CIPAA. Section 27(1) of the CIPAA reads:

> 27 Jurisdiction of adjudicator
>
> (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

[18] The adjudicator had to decide whether the claimant is entitled to claim for the amount owing for the work done, certified in certificate Nos 29–30 after taking into consideration the amount paid by the respondent so far. The jurisdiction of an adjudicator is undisputedly and strictly confined to the four corners of payment claim and payment response (if any).

[19] It then remained for the claimant to prove its payment claim. As the adjudication response is served pursuant to s 10(1) of the CIPAA in answer to the adjudication claim, it is open for the adjudicator to find common grounds between the parties if any. The adjudicator pointed out quite perceptively that the respondent agreed and admitted that the total value of the works certified is RM39,793,758.73.

[20] As submitted by learned counsel for the claimant, the respondent is thus estopped from denying that certificate Nos 29–30 certified that the total value of the works done is RM39,793,758.73.

[21] I agree with learned counsel for the claimant that it is trite law, that a payment certificate for work done shall bind the parties and particularly the employer to abide and honour the same in favour of the contractor. The significance of payment certificate for work done has been ruled by Kang Hwee Gee J (later JCA) in the case of *L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd* [2007] 4 MLJ 518 at p 532, para 63 as follows:

> [63] A *certificate is in essence a statement of ascertained and verified fact which is to be accepted as a statement of truth at face value.* The interim certificate therefore constitutes a finality of the assessed value of work done by the contractor which under the terms of the construction contract oblige the employer to pay the contractor the sum certified forthwith. The certificate cannot be varied or cancelled unless agreed to by both the contractor and the employer. (Emphasis added.)

[22] It is clear that work done in a certificate is value of work done by contractor which has been assessed where the employer shall be obliged to pay.

[23] The respondent's contention is that even if they were to accept the certificate of payments as a correct reflection of work done, it would not add up to RM3,229,733.30 but only RM1,363,379.94 as follows:

(a) Certificate No 29:	RM 299,354.51
(b) Certificate No 30:	RM1,064,025.43
Total:	RM1,363,379.94

[24] It was argued that should the adjudicator confine his jurisdiction to the claimant's payment claim pursuant to certificate No 29–30 then he would not have fallen into the error of having acted in excess of his jurisdiction by

considering what it seems to be, amounts owing under previous certificates of payment which the respondent is not admitting.

[25] However a closer look at the payment claim would show that the claimant is claiming not so much amount owing under the two certificates of payment 29–30 but rather the amount owing as evidenced by the works done duly certified by the said two certificates taking into consideration the amount paid so far.

[26] Thus in the payment claim under 'Particulars of claim' is set out the following:

(1) Total contract sum	RM42,561,017.22
(2) Total value of works certified under	
(a) Certificate No 29	RM39,793,758.73
Certificate No 30	RM 1,064,025.43
Total	RM40,857,784.16
Less	
(3) Retention sum 5% as per clause 9 of the letter of award	RM 2,128,050.86
(4) Total amount previously paid	RM35,500,000
Total Deduction	RM37,628,050.86
Amount Claimed	RM 3,229,733.30

[27] The key issue simply stated was what was the amount that the respondent had paid the claimant for the works done since both parties were not in dispute that the value of works done was valued at RM39,793,758.73.

[28] As the respondent had not bothered to give its reasons for disputing the claimant's claim, it would mean that the claimant had to show some evidence of the sum of RM35.5m paid by the respondent so far. There was no evidence in the adjudication claim or the adjudication response of the sum paid by the respondent to the claimant.

[29] The claimant in the adjudication reply produced as Schedule 8 a spreadsheet indicating that the claimant had been paid a sum of RM39,330,000 out of RM47,539,085.23 certified as work done. See para 17 of the adjudication decision.

[30] As the sum shown as certified in the spreadsheet was in excess of the contract sum of RM42,561,017.22, at the meeting on 4 July 2016, the adjudicator enquired of the parties' counsel as to the reason for this.

[31] The claimant's counsel stated that the additional sums were paid in respect of works for an additional phase of the same project, but not under the contract, and hence were reflected on the project spreadsheet. On the other hand, the respondent's counsel took the stand that the sum of RM39,330,000 reflected the total sum paid under the contract. This is found at para 18 of the adjudication decision.

[32] Under the broad powers given to the adjudicator under s 25 of the CIPAA, the adjudicator is at liberty to under s 25(i) and (j):

> (i) Inquisitorially take the initiative to ascertain the facts and the law required for the decision;
>
> (j) Issue any direction as may be necessary or expedient;

[33] The adjudicator therefore at the meeting of 4 July 2016 directed the parties to lodge statutory declarations as to the amounts paid to the claimant by the respondent by 18 July 2016. A statutory declaration is of course a declaration in writing made under oath before a commissioner for oaths such that if the declarations therein were found to be false, then the maker is exposed to a criminal charge for the offence of making a false statutory declaration.

[34] Parties duly filed their statutory declarations with the claimant's representative explaining that the additional sums was with respect to works for phase 2 of the same project.

[35] The respondent's statutory declaration on the other hand was evasive and non-committal when viewed against the backdrop of the reason behind the statutory declaration. It reads:

> I confirm that the payment made by Milsonland Sdn Bhd to Macro Resources Sdn Bhd to date amounts to RM39,330,000.

[36] The respondent also exhibited the same spreadsheet that was produced in the claimant's adjudication reply.

[37] The respondent had clearly avoided what was critical for it to clarify, which is whether the additional sum RM463,758.73 (RM39,793,758.73–RM39,330,000) was paid with respect to phase 1 or phase 2 of the project.

[38] The adjudicator had given his reasons for believing the claimant's version as to the amount paid and for rejecting the respondent's version. The adjudicator's reasons are both cogent and comprehensive as set out in his adjudication decision at para 21 below:

> In the absence of any explanation from the Respondent as to why sums considerably in excess of the Contract sum have been certified as due, I accept the Claimant's explanation. I am further strengthened in this conclusion by the fact that the Respondent in the Adjudication Response has stated as follows at Paragraph 14: 'The Respondent states that the value of the Works certified is RM39,793,758.73 ...'. This is inconsistent with the certified sum in the spreadsheet, and the failure to explain this inconsistency leads me to conclude that the Claimant's version of events is to be preferred. I also note that if the Respondent had in fact paid the Claimant the sum of RM39,330,000 in respect of the works done under the contract, it would have paid all but RM463,758.73 (RM39,793,758.73–RM39,330,000) of the amount certified to the Claimant, thereby in effect releasing the second moiety of Retention Sum. I can see no documents evidencing such release, and further fortifies me in my decision to accept the Claimant's evidence.

[39] I have no good reason to disagree with the adjudicator. At any rate, these are findings of fact and this being not an appeal, this court should not be reviewing the merits of the decision on a setting aside application.

[40] It does not lie for the respondent to now argue that the adjudicator should have referred to the architect the issue of how much has been paid by the respondent. I further agree with learned counsel for the claimant that there is also no need for the adjudicator to obtain assistance from the architect that has issued the certificates of payment to certify the amount paid for the said project. The certificates of payments are evidence of directions and findings of the architect and it means that the payment has been approved by the architect for payment to be made to the defendant. This would be in compliance of the letter of award as well as the articles of agreement executed by both parties and both parties are bound by this.

[41] It is a matter within the knowledge of the respondent as the party paying to be candid and to be able to say confidently and more importantly, correctly how much it has paid which has not been accounted for.

[42] It is for the adjudicator to establish under s 25(a) the procedures in conducting the adjudication proceedings and in a case where the expertise of an architect is not required for the dispute if at all, is on a proper accounting of payments made, it would be pointless and a dissipation of precious time to call on the architect to give his expert report.

[43] This part of accounting starting as it is from the common base of the value of work done as certified by the architects has only two deductions which is the retention sum and the amount paid so far. It is simple arithmetic and not algebra or algorithm.

[44] I am not persuaded that the adjudicator had acted in excess of his jurisdiction. On the contrary he had acted within the scope and ambit of the matters referred to him in the payment claim in the absence of a payment response.

Whether there was a breach of natural justice when the adjudicator disregarded the issue of delay and defects raised for the first time by the respondent in its adjudication response

[45] The dicta of Her Ladyship Mary Lim J (now JCA) in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695, Dato' Mary Lim Thiam Suan J (as she was then) at p 11, para 60, is both illuminating and instructive:

> [60] *Subsection 27(1) limits the adjudicator's jurisdiction to the matters referred to adjudication pursuant to ss 5 and 6; namely the claims in the payment claim and the responses or defences in the payment response.* This limitation is subject to sub-s 27(2) which allows the parties to the adjudication to extend that jurisdiction by written agreement to matters beyond or outside ss 5 and 6. *In the absence of such agreement, the adjudicator's jurisdiction does not extend to or include matters in the adjudication claim and the adjudication response or even adjudication reply found in* ss 9, 10 and 11. It is obvious from sub-ss 27(1) and (2) that where the parties feel that the adjudicator's jurisdiction is insufficient to deal with their particular dispute; the parties can sit down and agree on extending that jurisdictional cover. In the present case, the parties could have dealt with this through a written agreement amongst themselves. There was no such effort; and the court is not required to look into the reasons for the lack of such an effort ... (Emphasis added.)

[46] The respondent had raised the issue of alleged delay and defects on the part of the claimant. I agree that the respondent had not raised this issue in the payment response and as such the respondent had no right to raise this issue at this juncture of the adjudication response stage. In any event, the liability of the respondent as employer to pay to the claimant and the right and entitlement of the claimant to be paid by the respondant as provided by the said cl 9 are not subject to the duty of the claimant to remedy and rectify any defects during the defects liability period.

[47] Under certificate No 30 only half of the retention sum is due for release under the first moiety. The defects liability period has not yet lapsed as at the date of the adjudication response, and in fact would only come to an end on 8 August 2016 according to the certificate of practical completion dated 10 February 2015. Therefore the claimant cannot be said to be in default of any duty to rectify any defects as at the commencement of these adjudication proceedings nor even as at the date of the adjudication response. If at all there are defects not rectified, there is still the second moiety not yet due to be released.

[48] In any event the adjudicator also went on to find in para 12 of the decision that the adjudication response contains no averment of actual damage caused by the claimant's alleged breaches of the contract. He also observed that there was no allegation of a right to set-off damages against the claimant's claim. He concluded by stating that even if he were wrong in holding that he was precluded from considering these matters, he would still not have found them, on the facts, to constitute a reason for not allowing the claimant's payment claim.

[49] This court would reaffirm the adjudicator's stand in not considering the matters not stated in the payment response as being perfectly proper and certainly provided for in ss 5, 6 and 27(1) of the CIPAA.

[50] The adjudicator had placed reliance on the authority of *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 whereby the effect of the failure to file payment response is that the claimant is merely put to the proof of its claim and the respondent cannot assert positive defences. In that case, Justice Mary Lim J (now JCA) held in paras 65–68 that:

> [65] According to learned counsel for View Esteem, a reading of sub-s 6(4) seems to suggest that a party who has complied with the procedural requirements of the Act by filing a payment response is, in a sense, worse off from a party who has not. Learned counsel suggests that non-paying parties who do not file payment responses appear to be able to claim the benefit or protection of sub-s 6(4) and raise any defence for the first time in the adjudication response.
>
> [66] With respect, the court finds these concerns misplaced. It may be said that by virtue of sub-s 27(1), the payment claim and the payment response is to adjudication what pleadings are to civil litigation. Parties are bound by their pleadings under the rules of procedure in civil litigation; in adjudication, those pleadings are to be found in the payment claim and the payment response; and not in the adjudication claim, adjudication response or the adjudication reply.
>
> [67] The failure to file a payment response will only afford the non-responding party some security or comfort of not having had a default judgment of sorts entered against them because sub-s 6(4) deems the payment claim to be disputed.
>
> [68] For the unpaid party, the absence of a payment response means that the unpaid party as a claimant in the adjudication proceedings will only be required to prove the matters raised in the payment claim without having to meet any onus of proof which may, in a defended payment disputed through the Payment Response, shift back to the unpaid party or claimant.

[51] Her Ladyship also had occasion to observe in similar vein in *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* [2015] MLJU 1125; [2015] 1 LNS 1236, para 27 as follows:

> [27] Subsection 27(1) restricts the jurisdiction of the adjudicator to the matters

> found in ss 5 and 6. In short, *the Adjudicator takes jurisdiction from the payment claim and the payment response; not from the adjudication claim, adjudication response or even the adjudication reply*. This is materially significant and important as this brings to bear the whole scheme of CIPAA 2012; that the adjudication proceedings is to deal with or resolve a payment dispute. ... (Emphasis added.)

[52] Learned counsel for the claimant made reference to the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941. In brief, Hing Nyit Enterprise Sdn Bhd carried out some subcontract works and submitted interim claims. Bina Puri disputed those claims because it alleges a gross miscalculation in one of the payment certificates. There is in fact a pending suit whereby Bina Puri is claiming for refund of overpayment from Hing Nyit Enterprise Sdn Bhd. Unfortunately, when a payment claim was raised by Hing Nyit Enterprise Sdn Bhd under the CIPAA, Bina Puri did not file any payment response. Failure to file a payment response was considered to be a dispute of the entire amount under s 6(4) of the CIPAA. However, it limited Bina Puri to only disputing the claim without allowing them to raise the issue of their counterclaim. His Lordship Ravinthran Paramagaru J held as follows:

> [11] The dispute raised in the payment claim is in respect of the payments allegedly due under the said interim claims. The applicant did not file a payment response to raise the issue of counterclaim of RM13,544,690.45. In the premises, as the adjudicator does not possess inherent jurisdiction, *his jurisdiction is limited to the dispute raised under* s 5 and 6, *ie the payment claim and the payment response.* Sub-section (2) provides for the enlargement of the jurisdiction of the adjudicator by agreement. It reads as follows:
>
> > (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to ss 5 and 6.
>
> However, in the instant case, it is common ground that the parties did not execute an agreement pursuant to the above provision to extend the jurisdiction of the adjudicator to enable him to decide the counterclaim of the applicant. In the premises, *the adjudicator cannot be faulted for holding that he had no jurisdiction to decide the counterclaim of the applicant that was raised belatedly in the adjudication response.* Counsel for applicant also submitted that he had no opportunity to argue the said point as it was not raised in the submissions and there it resulted in a breach of natural justice. *The limits of jurisdiction of the adjudicator is a matter that is governed by law, ie* s 27 of the CIPAA. *Therefore, there can be no breach of natural justice if the adjudication had referred to the correct law to properly direct himself as to what he can or cannot do*. In any event, although the adjudicator declined to decide the counterclaim of the applicant that was only raised in the adjudication response, he considered the overpayment defence which is related to the counterclaim of the applicant. I shall consider it below. (Emphasis added.)

[53] Therefore there was no breach of natural justice when as constrained by

the clear provision of s 27(1) of the CIPAA, the adjudicator did not consider the issues of delay and defective works raised for the first time in the respondent's adjudication response.

Whether the adjudicator had acted in excess of jurisdiction in granting interest on the amount outstanding

[54] It was submitted on behalf of the respondent that the interest awarded by the adjudicator was never claimed by the claimant in its payment claim. That being the case, parties are bound by the payment claim and the payment response served.

[55] A claim for interest was made in the adjudication claim and the respondent had opportunity to respond to it. This claim for interest may be regarded as consequentially and naturally flowing from the amount claimed in the payment claim. It is more a submission of law on whether interest may be allowed upon a successful claim under a payment claim.

[56] I agree with learned counsel for the claimant that the adjudicator had acted well within his powers pursuant to s 25(o) of the CIPAA wherein the adjudicator shall have the power to award financing costs and interest. It is more an argument of law when it comes to a claim under a construction contract as to whether a contractor should be entitled to interest for being kept out of the monies due to him for work already done for which he had expanded labour, material and financing costs. In fact it is so axiomatic that it is hardly argued against.

[57] I cannot fault the adjudicator as having acting in excess of his jurisdiction when it was clearly within his power to award interest and when the respondent cannot seriously argue against it. The adjudicator reasoned this way at para 24 of the adjudication decision as follows:

> The Claimant has prayed for interest at the rate of 5% per annum. I am of the view that this is reasonable. I am of the view that this should be awarded on the sum of RM3,229,733.30 from 30 April 2015 (ie 30 days after Certificate Number 30) until satisfaction. I am further of the view that the Claimant should be awarded interest at 5% on the sum of RM2,165,707.87 (ie RM3,229,733.30–RM1,064,025.43) from 30 April 2014 (being a convenient date taking into account that some monies appear to have been outstanding for a longer period) to 30 April 2015, ie a period of one year.

PRONOUNCEMENT

[58] In the upshot, for all the reasons given above, I would dismiss the originating summons for setting aside the adjudication decision and allow the

originating summons for enforcement with a single costs of RM10,000 to be paid by the respondent Milsonland to the claimant Macro Resources.

[59] Allocator to be paid before extracting order of costs.

Respondent's action dismissed; claimant's action allowed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar